STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SBC Communications, Inc., SBC Delaware, Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc.	)	
	)	**ICC Docket No. 98-0555**
Joint Application for approval of the reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois, and the reorganization of Ameritech Illinois Metro, Inc. in accordance with Section 7-204 of the Public Utilities Act and for all other appropriate relief.	)	

BRIEF ON EXCEPTIONS ON REOPENING OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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INTRODUCTION

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel and pursuant to the Commission's Rules of Practice, 83 Ill. Adm. Code Ch. I, § 200.830, respectfully submits this Brief on Exceptions on Reopening to the Hearing Examiners' Proposed Order (Proposed Order" or "HEPO") issued on August 10, 1999. In the instant pleading, Staff takes exception to the following issues: a) Actual Potential Competition; b) Savings; c) Additional Commitments by Joint and d) Enforcement: Liquidated Damages Provisions.

ARGUMENTS AND EXCEPTIONS

EXCEPTION 1

ACTUAL POTENTIAL COMPETITION

I. The HEPO should find that the proposed merger is likely to inhibit the ability of competitive carriers to enter the market and increase their supply of the good.

In the first full paragraph on page 29 of the HEPO, the Hearing Examiners conclude that "there is, however, no conclusive evidence to show that the proposed merger will inhibit the ability of competitive carriers to enter the market and to increase their supply of the goods." HEPO on Re-Opening at 29. The Commission should modify this statement in two respects. First, the statement should reflect the appropriate statutory standard, i.e., likelihood. Second, the statement should conclude that the evidence proves the likelihood of the proposed merger harming competition in this manner.

A. The appropriate statutory standard is that competitive harm is "likely."

Subsection 7-204(b)(6) requires the Commission to find that "the proposed reorganization is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction." 220 ILCS 5/7-204(b)(6)(emphasis added). Accordingly, the plain and unambiguous language of the PUA only requires a likelihood of competitive harm, instead of a certainty of such harm. The HEPO's statement that "no conclusive evidence" exists raises the statutory standard from likelihood to certainty. This language should be eliminated.

B. The preponderance of evidence establishes that the proposed merger is likely to inhibit the ability of competitive carriers to enter the market and to increase their supply of the good.

The Joint Applicants have admitted that the proposed merger will lessen Ameritech Illinois' future market share loss. SBC-Ameritech Ex. 4.1 at 31. A necessary corollary to the Joint Applicants' admission is that the proposed merger will lessen competitive carriers' ability to enter the market and expand the competitive supply of the good. Otherwise, the amount of competitive carriers' future market share gains would be unchanged by the proposed merger. Since the only way to transition the market to competition is to increase the competitive supply of the good and decrease Ameritech Illinois' share of the market, the Joint Applicants' have admitted that the proposed merger will inhibit the market's transition to competition.

No contradictory evidence on this issue exists. Accordingly, the HEPO's conclusion that the proposed merger will not inhibit the ability of competitive carriers to enter the market and to increase their supply of the good is against the totality of the

evidence. The Commission should change the HEPO to find that the proposed merger is likely to inhibit the market's transition to competition.

II. The HEPO should find that the proposed merger is likely to adversely effect competition by increasing the market's barriers to entry.

In the second full paragraph on page 29, the HEPO on Re-Opening concludes that "the proposed merger will not increase the market's barriers to entry preventing competitive carriers from entering or expanding the supply of the goods." HEPO on Re-Opening at 29. The Hearing Examiners assert two bases for their conclusion. First, the Hearing Examiners state the arguments to the contrary are speculative. Second, they assert that the Commission's continued regulatory jurisdiction over Ameritech will somehow offset increased barriers to entry if such barriers result from the proposed merger. Neither of the Hearing Examiners' bases are legitimate.

A. Staff's arguments on this issue are not mere speculation.

Staff's expert witnesses did not speculate as to how the proposed merger will alter the market's barriers to entry. Rather, Staff's experts set forth a reasoned analysis, based on facts, which establishes a probability that all of the identified increases in the market's barriers to entry will result from the proposed merger. Each of the Staff's' identified increases in barriers to entry are addressed in turn.

1. The level of disparity between the information held by Ameritech Illinois and the CLECs will increase.

Staff witness Mr. Graves testified to this likely increase. Mr. Graves based his opinion on the fact that SBC has significant experience as a local exchange provider

both as an incumbent and a competitive carrier. A simple comparison of revenues, facilities and the number of employees of SBC versus other CLECs (see, ICC Staff Ex. 4.02, Attachment 5), shows that SBC's resources and experience dwarf those of other potential competitors. A second fact is that SBC has acquired knowledge to compete as a local exchange provider through such experience, including acquiring the knowledge to engineer networks, provide customer service, build billing systems, and conduct research and product development. A third fact is that not all CLECs have local exchange experience or the knowledge to compete which comes from such experience. Mr. Graves reasoned that transferring SBC's knowledge to Ameritech Illinois from the CLEC side of the market necessarily increases the level of disparity between the two sides of the market. ICC Staff Ex. 4.0 at 35. Mr. Graves' opinion is based on fact; it is not speculation.

2. The amount of information available to consumers about alternative providers to Ameritech Illinois will decrease.

Mr. Graves testified to this increase in the market's barriers to entry. Mr. Graves based this opinion on the fact that a number of Illinois consumers have knowledge about SBC, both as a local exchange carrier and as a cellular provider. Mr. Graves made the reasoned determination that the elimination of SBC as a CLEC necessarily results in the information available to Illinois consumers regarding alternative providers decreasing. ICC Staff Ex. 4.0 at 27-28, 35; see also, ICC Staff Ex. 4.2 at 4-6 (discussing SBC Marketing Research and Analysis Department reports which establish a substantial likelihood that SBC's cellular customers would act on their knowledge of SBC as a cellular provider to choose SBC as an alternative to Ameritech Illinois).

Again, Mr. Graves' opinion is based on fact and does not constitute speculation.

3. The lack of certainty about resale prices and UNE terms and conditions will increase.

Mr. Graves also presented testimony on this increase in the market's barriers to entry. Mr. Graves' opinion is based on the fact that Ameritech Illinois' resale and UNE prices are derived from Ameritech Illinois' underlying costs. Also, the proposed merger could cause Ameritech Illinois' underlying costs to change. Until Ameritech Illinois' underlying costs are known, uncertainty regarding Ameritech Illinois' resale and UNE prices exists. Mr. Graves reasonably concluded, based on these facts, that the proposed merger will increase uncertainty about Ameritech Illinois' resale and UNE prices. ICC Staff Ex. 4.0 at 31-32. Such a reasoned analysis based on facts does not constitute speculation.

4. Increased resistance to the Commission's pro-competitive policies and the implementation of anticompetitive practices within Illinois under the guise of best-practices.

Mr. Graves testified to Staff's opinion that the proposed merger will increase Ameritech Illinois' resistance to the Commission's pro-competitive policies. Mr. Graves based his opinion on facts regarding SBC's conduct in other states. Also, the fact is that SBC will dictate the combined company's corporate goals, commitments and business principles. Accordingly, Mr. Graves made the reasoned conclusion that the proposed merger will increase the risk that Ameritech Illinois will resist the Commission's pro-competitive policies. ICC Staff Ex. 4.0 at 32-34. This is not speculation.

5. Increased incentive and ability to discriminate.

Staff witness Dr. Hunt testified to this increase. Dr. Hunt's opinion that the

proposed merger will increase Ameritech Illinois' incentive to engage in discriminatory conduct is based on the following related set of facts: (1) firms have the incentive to increase profits, (2) firms reap profit rewards from engaging in discriminatory conduct, and (3) firms' profit rewards from engaging in discriminatory conduct multiply when firms' expand the geographic and product reaches of the markets which they control. ICC Staff Ex. 9.0 at 56-65. Dr. Hunt's opinion that the proposed merger will increase Ameritech Illinois' ability to engage in discriminatory conduct is based on the following facts: (1) the proposed merger will increase the number of jurisdictions and regulated/unregulated markets in which the combined company operates, and (2) regulators' ability to detect discriminatory conduct decreases as the number of jurisdictions and regulated/unregulated markets in which a company participates increases. Id.

Granted, Dr. Hunt did not testify to a certainty that Ameritech Illinois would engage in increased discriminatory conduct. However, the facts establish that Ameritech Illinois will have an increased incentive and ability to engage in discriminatory conduct. Whether such conduct will take place cannot be known with certainty. But, the proposed merger does increase the likelihood that such conduct will occur. It is this increased likelihood of occurrence which is important. Dr. Hunt's opinion that the proposed merger will result in such an increased likelihood does not constitute speculation.

B. The Commission's continued jurisdictional authority over Ameritech Illinois has no mitigating effect on the identified increases in the market's barriers to entry.

The HEPO relies on the fact that the Commission will continue to have regulatory authority over Ameritech Illinois to discount the significance of any increased barriers to entry. HEPO on Re-Opening at 29. The Commission does have the authority to deal with anti-competitive practices within Illinois. However, those practices may not be noted until after implementation within Illinois. Moreover, rules and regulations may not prevent the proposed merger from (1) increasing the level of disparity between the information held by Ameritech Illinois and CLECs, (2) decreasing the amount of information available to consumers about alternative providers to Ameritech Illinois, (3) increasing uncertainty about resale and UNE prices, (4) increasing resistance to the implementation of pro-competitive policies, and (5) increasing Ameritech Illinois' incentive and ability to engage in discriminatory conduct.

Finally, in regards to an increase in Ameritech Illinois' ability to engage in discriminatory conduct, Dr. Hunt based his opinion that the proposed merger would effectuate this result on the fact that as companies expand their geographic and product market reaches, regulators' ability to detect discriminatory practices decreases because companies are able to hide their discriminatory practices across jurisdictional lines and between regulated/unregulated affiliates and subsidiaries. Moreover, reliance on regulation is contrary to the policy to transition the market away from regulation to reliance on competition. (See, *e.g.*, 220 ILCS 5/13-103(b)). Accordingly, the Commission should remove the rationale that Ameritech Illinois will remain subject to the Commission's jurisdiction from the Commission's analysis of this issue.

III. The HEPO should find that SBC's entry would be significant.

The HEPO correctly concludes that the first three elements of the Actual Potential Competition Doctrine are satisfied. However, when the HEPO turns to the Doctrine's fourth element, it concludes that "the impact from SBC's likely independent entry into Illinois' local exchange market would not be significant." HEPO on Re-Opening at 30. The HEPO's conclusion is based on three incorrect premises. First, the HEPO incorrectly asserts that SBC would have to single-handedly deconcentrate the market to satisfy the APC Doctrine's fourth prong. Second, the HEPO inappropriately compares the significance of SBC's likely entry to that of other potential competitors, failing to recognize that the significance of other potential competitors' entries is only a consideration under the doctrine's fifth prong. Third, the HEPO implies that entry focused on capturing large corporate customers would, at the least, not benefit and, at the most, harm small business and residential customers.

A. SBC does not need to be likely to significantly deconcenrate the market to satisfy the doctrine's fourth prong.

The APC Doctrine's fourth prong provides that independent entry must be likely to deconcentrate the market or lead to "other procompetitive effects." United States v. Marine Bancorporation, 418 U.S. 602, 633 (1974). The phrase "other procompetitive effects" must be emphasized because it is well established that new entrants into concentrated markets are not expected to single-handedly deconcentrate those markets. Mercantile Tx. Corp. v. Board of Governors, 638 F.2d 1255, 1270 (5th Cir. 1981). The rationale for the rule lies in economics: new entrants into highly

concentrated markets are generally unable to overcome the dominant firms' market power to single-handedly deconcentrate those markets.

Accordingly, it is established that the APC Doctrine's fourth prong is satisfied when new entrants have other procompetitive effects on concentrated markets. In other words, new entrants significantly contribute to the promotion of competition when they engender competitive motion and shake up the market. Professors Areeda and Turner explain the principle as follows:

> [A] probable future entrant into the concentrated … market at issue would ordinarily improve competition. By adding capacity and by trying to acquire a permanent and solid stake in the market, the new entrant would probably disrupt a settled oligopoly, even if it ultimately failed to win more than a modest market share.

Areeda and Turner, V Antitrust Law, para. 1121d4 at 116-117 (emphasis added).

Moreover, this procompetitive effect is generally presumed by the entry of large firms as new competitors because the likelihood of such firms engendering such procompetitive effects is so highly likely. BOC Internat'l., Ltd. v. F.T.C., 557 F.2d 24, 27 (2nd Cir. 1977)(even questioning the importance of this prong of the APC Doctrine because of the presumption of its satisfaction). Professors Areeda and Turner concur in the appropriateness of this presumption:

> [W]e consider it appropriate, as a matter of burdens and proofs, to begin with the presumption that a probable future entrant would be a significant addition to future competition. That presumption, however, could be overcome. … Nevertheless, we suppose that a comparably satisfactory rebuttal of the general presumption would be quite rare.

V Antitrust Law, para. 1121d4 at 117 (emphasis added). Acting in a manner similar to the Second Circuit, Professors Areeda and Turner also suggest that the critical questions under the APC Doctrine lie elsewhere than the likely significance of the

acquiring firm's procompetitive entry. Id.

As a result, it is an established economic and legal principle that the amount of deconcentrating effect that a new entrant must be likely to attain to satisfy the APC Doctrine is quite small, if anything. Even the DOJ Guidelines, which the Joint Applicants advocate so strenuously in this proceeding, hold that a new entrant's impact on a market is significant if the new entrant's entry results in deconcentrating the market by as little as 50 to 100 HHI points. DOJ Merger Guidelines at Sec. 3.11, 4.133. Staff proved that SBC's entry is highly likely to deconcentrate the market by well over 100 HHI points. See, Staff Brief on Exceptions at 119-127 (providing calculations based on SBC's plans to enter top 30 out-of-region markets through a large corporate bundled offering strategy and SBC's actual entry into Rochester market via cellular expansion); Staff Brief on Re-Opening at 19-20 (providing calculations based on SBC Market Research and Analysis Reports for entry into Illinois via cellular expansion). Notably, Staff's method of proof follows the method recommended by Professors Areeda and Turner for calculating likely scale of entry. V Antitrust Law, para. 1121d3 at 115-116 (stating that reliance should be placed on firm's plans for entering "similar" markets or for "similar" firms' plans for entering "similar" markets as a firm's plans for entering the relevant market are seldom available).

Accordingly, the HEPO's findings on this issue contradict established legal and economic principles. For example, the HEPO states that "while SBC could likely enter the local market in the next three to five years, it is improbable that SBC will be able to single-handedly deconcentrate the market." HEPO on Re-Opening at 31. The Commission should disregard such deviation from established authority and, instead,

find that the APC Doctrine's fourth prong is established based on Staff's calculations of SBC's likely scales of entry.

B. The significance of SBC's entry does not depend on the significance of other competitor's entries.

The HEPO rejects Staff's analysis for allegedly failing to attribute the same amount of significance to other competitors' potential entries or expansions in the market as Staff attributes to SBC's likely entry. HEPO on Re-Opening at 30. However, the significance of alternative competitors' future entries into or expansions within the market is irrelevant under this prong of the APC Doctrine. When the significance of other firms' competitive abilities does become relevant is under the APC Doctrine's fifth prong which requires a determination of whether a sufficient number of alternative competitors exists. A number of alternative competitors becomes "sufficient" only when the number is enough such that the competitors' combined efforts is likely to deconcentrate the market. Accordingly, under the fifth prong, one must identify the alternative entrants as well as evaluate the combined likely significance of their entries and expansion efforts to determine whether their efforts, given merger approval, would likely be "sufficient" to deconcentrate the market.

Accordingly, the HEPO's assertion that Staff attached significance to SBC's likely entry but none to alternative competitors' efforts is a misstatement of Staff's analysis. If Staff had needed to evaluate the significance of the alternative competitors' efforts individually pursuant to the APC Doctrine's fourth prong and the standard which has been developed to evaluate that prong, Staff may have found that some or all of the identified alternative competitors' efforts would likely be significant. However, Staff

applied the doctrine as developed by the courts and economic theory, thereby limiting its analysis of the significance of the alternative competitors' efforts to whether their combined efforts would likely be sufficient to deconcentrate the market. That aspect of Staff's analysis was developed under the doctrine's fifth prong.

The HEPO's misperception of Staff's analysis is further reflected in its statement that "[t]here is no evidence that SBC would have more of an impact on the Illinois local exchange market than potential entrants like AT&T, MCIW, and Sprint, all of which have significant technical and capital resources, ILEC experience, and national brand names." HEPO on Re-Opening at 30. Based on the fourth prong's standard, it is likely that the IXC's efforts would be found to be significant if such an analysis were performed. Accordingly, for SBC's entry to be significant, SBC does not have to have a greater impact on the market than the IXCs. Staff's comparison of SBC's competitive abilities versus the IXCs and others does not contradict this method of analysis. Staff's comparison was merely a demonstration that SBC would be likely to have an even greater impact on the market, i.e., that its entry would be even more significant, than alternative competitors. It was also a demonstration that the other carriers' efforts would not be "sufficient" to transition the market to competition despite the significance of their efforts.

C. An entry strategy focused on large corporate customers would not harm or fail to benefit small business and residential customers.

The HEPO states that any SBC entry which is geared to capture large corporate customers "does not benefit, and may even harm small business and residential customers." HEPO on Re-Opening at 30. The HEPO does not explain the rationale

which underlies this statement. However, it appears to be based on two misconceptions: (1) that an entry strategy geared to capture large corporate customers would limit entry efforts to that market segment, and (2) that Ameritech Illinois' loss of large corporate customers to SBC would have adverse rate impacts on other market segments.

1. An SBC entry strategy geared to capture large corporate customers would not be limited to that market segment.

Firms act to maximize profits. ICC Staff Ex. 4.0 at 42. Accordingly, firms are likely to target the highest value customers when they enter a market. However, firms will continue to expand their service offering as long as such expansion is profitable. In other words, when other market segments offer profits, firms will not ignore those profits by arbitrarily limiting their competitive offering to the most profitable market segment.

Not surprisingly, SBC developed its National-Local Strategy following just this rationale. SBC's internal documents show that SBC intends to target the highest value customers during the initial role-out of its strategy. For SBC, the highest value customers are SBC's in-region large corporate customers operating out-of-region. SBC refers to those customers as its "anchor tenants." From there, SBC intends to target other high-value, large corporate customers. However, SBC does not intend to limit its service offering to large corporate customers. Rather, in the words of SBC's Vice President of Corporate Development, SBC's "goal is to offer a package of services that will attract those customers that we can earn in excess of our cost of capital." Tr. at 378. The high-value customers which will allow SBC to earn in excess of its cost of capital are spread across all telecommunications market segments. Id. at 379. SBC's

business plans establish that SBC anticipates winning significant shares of the small business and residential market segments. SBC-AMIL 009114-009115.

The markets which SBC intends to enter through its National-Local Strategy are substantially similar to Illinois' telecommunications markets. The customer characteristics which SBC faces when contemplating entry into the out-of-region markets identified in its National-Local Strategy would not change if SBC were to enter Illinois' markets under a similar strategy. Accordingly, SBC would likely expand upon an initial offering to large corporate customers by targeting high-value customers within the small business and residential market segments in Illinois. The record evidence is undisputed on this issue.

2. Ameritech Illinois' captive customers will not suffer adverse rate impacts in the absence of acquisition.

Staff has explained that Ameritech Illinois' remaining customers are likely to suffer adverse rate impacts if Ameritech Illinois looses a large share of its revenue producing, large corporate customers to a National-Local Affiliate. ICC Staff Ex. 9.01 at 31-37. The HEPO appears to utilize this rationale to conclude that the adverse rate impacts will also result if Ameritech Illinois is subject to competition for its large corporate customers from an independently operating SBC. This is not the case.

The adverse rate impact would potentially result from Ameritech Illinois maintaining the same fixed cost across a smaller customer base, thereby increasing the amount of cost which Ameritech Illinois has to recover per customer. However, Staff witness Dr. Hunt explained that this scenario can be countered through two routes: (1) Ameritech Illinois selling off the assets which it no longer utilizes because other carriers

are serving customers, thereby reducing its fixed costs; and (2) utilizing its resources to compete in new, complementary telecommunications markets, thereby increasing its revenues. ICC Staff Ex. 9.0 at 41-49. Under cross-examination, SBC witness Mr. Kahan stated his strong belief that firms undertake just these sorts of activities when faced with loosing customers to competitors. Mr. Kahan explained that when firms are faced with competition, those firms do not fail to look after their bottom lines by simply letting their competitors win their customers; rather, those firms find ways to become competitive and produce profits. Tr. at 325-327. The reason that an adverse rate impact is likely to result with the merger but not without is that Ameritech Illinois will have an incentive to engage in these sorts of activities without the merger but not with the merger.

First, if Ameritech Illinois' large corporate customers are transferred to an affiliate, Ameritech Illinois will not have an incentive to sell off unused assets which Ameritech formerly utilized to serve those customers because the affiliate will likely continue to utilize those assets for its service. SBC-Ameritech Ex. 1.3 at 20. Even though regulation should ascertain that Ameritech Illinois recovers its costs for those assets from its affiliate, the large revenues from serving large corporate customers with those assets will accrue to the affiliate. This means that Ameritech Illinois' fixed costs will remain the same but its revenue to cover those costs will fall. However, as long as the revenues from serving those customers accrue to an SBC affiliate, SBC will not have an incentive to fix the imbalance which results in Ameritech Illinois' cost/revenue relationship. As stated by SBC witness Mr. Kahan, the merged SBC/Ameritech "will ultimately view the economic return on serving these customeres on a consolidated

basis." Id.

Second, Ameritech Illinois would not have an incentive to undertake competitive strategies to compete against an affiliate. Again, a combined SBC/Ameritech would consider its competitive strategy from a consolidated basis. In this case, that strategy is the National-Local Strategy which results in revenues accruing through a different part of the firm. On the other hand, if Ameritech Illinois were faced with losing those same customers to an independently operating SBC, Ameritech would undertake a strategy to compete for those customers which would likely expand Ameritech Illinois' business into related telecommunications fields. Ameritech Illinois' competitive activity would likely result in a new line of revenues which would offset the loss of any revenues to SBC.

IV. THE HEPO SHOULD FIND THAT AN INSUFFICIENT NUMBER OF ALTERNATIVE COMPETITORS EXISTS TO ELIMINATE THE NEED FOR SBC'S INDEPENDENT ENTRY.

The HEPO concludes that a sufficient number of alternative competitors exists such that it is not necessary to preserve SBC as an independent entrant. HEPO on Re-Opening at 30-31. The HEPO arrives at its conclusion by misapplying the fifth prong's standard in a number of ways. The appropriate standard for analysis is whether likely alternative competitors' abilities to enter and expand their market shares would be sufficient to transition the market to competition. However, the HEPO (1) analyzes SBC's competitive abilities against those of other carriers, such as AT&T and MCI, to discount the need for SBC's independent entry, and (2) fails to determine whether identified alternative competitors' abilities will be sufficient to deconcentrate

the market in the context of merger approval.

A. The APC Doctrine's fifth prong does not require a finding that SBC would be the most significant competitor.

The HEPO determines that AT&T and MCI are likely to be even greater competitors than SBC if SBC were to enter the market independently. HEPO on Re-Opening at 31. The purpose of this prong of the doctrine is not to determine which potential competitor is likely to be the most significant competitor. Rather, the Commission must determine whether the combined efforts of all other potential competitors is likely to be sufficient to deconcentrate the market if the merger is approved, i.e., when the acquiring firm has been allowed to enter the market through acquisition. The HEPO's finding that AT&T and MCI are "the most likely to rapidly capture market share from Ameritech Illinois in the near future," Id., is an inappropriate basis upon which to rely because such a finding does not lead to the conclusion that the efforts of AT&T and MCI will be sufficient to deconcentrate the market in the context of merger approval.

B. The evidence does not support a finding that the alternative competitors identified by the HEPO are sufficient to deconcentrate the market.

The HEPO finds that "Ameritech Illinois would have at least six major competitors (AT&T, MCIW, Sprint, Bell Atlantic, BellSouth [sic], and US West) after the merger." HEPO on Re-Opening at 31. The HEPO goes on to state that "[t]his number is sufficient and undisputed." Id. In essence, the HEPO appears to rely on the sheer number of identified alternative competitors rather than the sufficiency of those competitors' abilities to deconcentrate the market.

Staff has disputed the sufficiency of alternative competitors' abilities to deconcentrate the market throughout the course of this proceeding. Staff has explained that the Commission should preserve all possibilities of deconcentrating the market given the market's significantly high degree of concentration. At the least, Staff has urged the Commission not to arbitrarily limit the number of required alternative competitors to six merely because the DOJ Merger Guidelines suggest such a number for general use when evaluating markets with significantly lower levels of concentration. In the interest of brevity, Staff will not reiterate these arguments but respectfully refers the Commission to Staff's previously filed briefs in this proceeding. Staff Initial Brief at 37-40, 71; Staff Reply Brief at 58-61; Staff Brief on Exceptions at 114-119; Staff Brief on Re-Opening at 21-28.

However, it must be emphasized that the Joint Applicants have admitted that the number of alternative competitors are insufficient to deconcentrate the market. SBC's internal business plans project Ameritech's market share over the next 10 years with merger approval. Those plans establish that Ameritech's market share will not sufficiently drop to deconcentrate the market, or even materially change in the context of merger approval. SBC-AMIL 009114-009115. Accordingly, the evidence conclusively establishes that this prong of the APC Doctrine is met.

C. <u>The evidence establishes that the Commission should not rely on AT&T to single-handedly deconcentrate the market.</u>

The HEPO states as follows:

> Nor can we dismiss AT&T's recent mergers and its stated desire to develop a cable alternative to telephone service. This is evidence of the creative and expansive ways that telecommunications providers are

> changing the markets. AT&T's cable service, in the next three to five years, could be developed to provide local exchange service on a large scale. We are not persuaded by Staff's attempts to minimize the significance of this venture.

HEPO on Re-Opening at 31. The HEPO ignores the risks which AT&T faces in developing a competitive alternative over cable. Further, even if AT&T does develop such an alternative, the HEPO does not acknowledge that the interjection of a single competitive alternative is insufficient to deconcentrate the market.

In Staff's Brief on Re-Opening, Staff recommended that the Commission take a cautious approach to its evaluation of AT&T's competitive significance in light of its recent mergers. Staff explained that AT&T's acquisitions of cable companies do not affect the local exchange telecommunications market unless AT&T develops a cable telephony service. Staff informed the Commission of the risks which AT&T faces undertaking such a venture, and predicted the likelihood of success as between 25% to 30%. Staff Brief on Re-Opening at 26-27.

But, most importantly, Staff explained that even if AT&T does develop such a competitive alternative, the Commission should not rely solely on AT&T to deconcentrate the market. Id. at 27-28. Staff stated that even if AT&T were able to win a large enough market share to transition the market out of its current de facto monopoly status, the interjection of a single alternative competitor merely transitions the market to a highly concentrated oligopoly which will be characterized by the same types of anticompetitive problems as the market's current condition. Id. at 28. Accordingly, Staff explained that a larger number of alternative competitors are needed to deconcentrate the market.

V. THE HEPO SHOULD BE MODIFIED TO ACCEPT STAFF'S PROPOSED CHANGES.

Staff recommends that the Commission modify the HEPO at pages 27-31 as follows:

Commission Analysis and Conclusion

Section 7-204(b)(6) requires the Commission to ascertain that the merger "is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction." We have jurisdiction over four markets -- local exchange, intraMSA toll, interMSA toll, and to a lesser extent, cellular -- to the extent these markets affect intrastate communications in Illinois. Also, we agree with Staff that wireless service is not a clear substitute for wireline service. Therefore, we conclude that the wireline market is the appropriate product market for the Commission's consideration. We find Staff's proposal that Joint Applicants be required to send notice to customers of the divested cellular affiliate before sale of the affiliate to be reasonable. We see no reason why it would delay consummation of the merger.

As for the different markets over which the Commission has jurisdiction, we agree with Staff and Joint Applicants that the merger would not affect the Illinois interMSA market adversely. We agree with Staff that the proposed merger would not impact adversely the number of buyers and sellers of interMSA toll services; the standardization of those services; the ability to enter the interMSA toll market; or the amount of information available to buyers and sellers.

On the key question of whether SBC is an actual potential competitor in Illinois, the Joint Applicants propose that we use the DOJ's merger Guidelines as a framework for our analysis. Staff agrees that it would be reasonable for us to use these Guidelines only as an information tool to guide our analysis of the proposed merger pursuant to the Actual Potential Competition doctrine. In other words, Staff urges that we not strictly apply the standards contained in the Guidelines on this issue, and that we not limit our analysis to the Actual Potential Competition doctrine. We concur with Staff in these respects and will use these Guidelines as a starting point to determine the effect, if any, the merger would have on potential competition pursuant to the Actual Potential Competition doctrine, but we will not give them conclusive effect. Nor do we limit our analysis of the proposed merger's likely effects on competition under the Actual Potential Competition doctrine.

We have several reasons for using the Guidelines as the starting point for our analysis. First, they have been used by the FCC and other state commissions to analyze ILEC mergers. See, e.g., Bell Atlantic/NYNEX Order at ¶37; California SBC/PacTel Order at 41-42. Second, there is no reason they should not be applied to this merger; indeed, they have been applied to nearly identical mergers. Id. We

recognize, however, that the FCC and other state commissions have not applied the Guidelines mechanistically. The California Commission referenced the guidelines but recognized that it was operating under state law. Also, in its recent review of the BA/NYNEX merger, the FCC undertook an analysis quite similar to the analysis recommended by Staff in this proceeding. We will follow the FCC's lead to fulfill our mandatory duties under subsection 7-204(b)(6) to consider all effects that the proposed merger is likely to have on competition.

Accordingly, we will also consider the other two bases which Staff advanced as reasons why the proposed merger is likely to have an adverse effect on competition, i.e., that the proposed merger is likely to inhibit the market's transition to competition and to increase the market's barriers to entry. Not only do we find that Section 7-204(b)(6) requires us to consider these positions; but, these positions were undeniably found to be the means by which mergers of local exchange carriers can have adverse effects on competition by the FCC. Thus, they are suitable areas for our inquiry.

We recognize the general concept that competition only develops when competitive firms are able to enter a market and expand the supply of good that is being provided. In these premises, Ameritech Illinois' dominant market share must be eroded by the entry of competitive carriers and an expansion of their supply of goods. ~~There is, however, no conclusive evidence to show that the proposed merger will inhibit the ability of competitive carriers to enter the market and to increase their supply of the goods.~~ The evidence conclusively establishes that the proposed merger will inhibit the ability of competitive carriers to enter the market and to increase their supply of the good. Accordingly, the proposed merger will protect Ameritech Illinois' market share and inhibit the market's transition to competition.

We also ~~do not~~ believe that the proposed merger will increase the market's barriers to entry preventing competitive carriers from entering or expanding the supply of the goods. ~~It has been argued that t~~The barriers to entry will increase in a number of ways, including increasing the level of disparity between the information held by Ameritech Illinois and CLECs, decreasing the amount of information available to consumers about alternative providers to Ameritech Illinois, and resale and UNE prices, increasing resistance to the implementation of our pro-competitive policies, creating an opening for the adoption of anticompetitive practices within Illinois under the guise of best practices, and increasing the company's incentive and ability to discriminate. ~~This, however, is based only on speculation not evidence. It also fails to account for the fact that Ameritech will continue to be subject to our jurisdiction and to all the dictates of the Act and our rules.~~ An increase in the market's barriers to entry will also prevent competitive carriers from entering or expanding the supply of the good that is provided by competitive carriers.

Under the Guidelines, a showing of an adverse effect from a merger or acquisition on potential competition is determined through the application of the Actual Potential Competition doctrine. As set out by Staff, the Actual Potential Competition

Doctrine requires all of the following elements: (1) the market is concentrated; (2) the acquiring firm plans on entering the market through the acquisition of a dominant firm; (3) the acquiring firm would have likely entered the market either through de novo expansion or a toe-hold acquisition in the near future in the absent the merger; (4) either de novo entry or entry through a toe-hold acquisition by the acquiring firm would have been likely to deconcentrate the market or result in other procompetitive effects; and (5) an insufficient number of similarly situated alternative entrants exists. Staff Brief on Re-Opening at 4. In conducting this analysis, probable entry means entry in the "near future," and not simply at any foreseeable point in time. See, e.g., 79 Op. Cal. Atty. Gen. 301, 1996 Cal. AG LEXIS, at *44-45 (1996). For the purposes of our analysis, we will use a three-to-five year future time period proposed by Staff as the so-called near future.

Applying the doctrine to the facts in this case, and looking at the first and second elements of the doctrine, we agree with Staff that the evidence establishes a significantly concentrated market for local service. Also, we find that Ameritech Illinois is the dominant provider within the market. Hence, these first and second elements are satisfied.

Considering the doctrine's third element, we are faced with conflicting positions. Although SBC's executives testified that SBC has no plans to enter Illinois local markets in the near future, there are other factors of record which bear upon the issue and which we are urged to consider. First, there is evidence tending to show that SBC has the incentive to enter Illinois to pursue a national, bundled services strategy. Second, the evidence suggests that SBC has some incentive to enter Illinois to pursue a cellular expansion strategy. Third, we find that SBC has a financial investment in OnePoint, which is a CLEC operating in Chicago.

Overall, it is important to note that the relevant inquiry is whether SBC "would likely" compete with Ameritech Illinois in the near future. See, e.g., FCC BA/NYNEX Order at para. 138 n. 260. We view factors such as SBC's geographic proximity, physical assets, and cellular experience in Illinois as relevant to its "likely" entry. Those factors support Staff's position that SBC would act to increase profits in the absence of acquisition, and that such a desire to increase profits would likely bring SBC to Illinois in perhaps 3-5 years.

As to the doctrine's fourth element, we find that the impact from SBC's likely independent entry into Illinois' local exchange market would ~~not~~ be significant. ~~When we examine the various parties assertions, they invariably suggest that SBC's entry would be limited in scope and geared to capture large business customers. While even such entry may benefit competitors, it does not benefit, and may even harm small business and residential customers. At the very least, Staff argues, SBC's entry would shake up the market and engender competitive motion which would be a significant impact, in light of the fact that the market has seen little competitive movement since deregulatory efforts began. We note, however, that Staff does not apply the same~~

~~reasoning with respect to AT&Ts recent local competitive strategy.~~

~~There is no evidence that SBC would have more of an impact on the Illinois local exchange market than potential entrants like AT&T, MCIW, and Sprint, all of which have significant technical and capital resources, ILEC experience, and national brand names. In other words, the same factors which are ascribed to SBC apply to these entities as well. Even if SBC were to enter the Illinois local exchange market, there is no evidence that it would not do what some other carriers are doing, which is to pursue large business customers only, with no impact on the provision of local exchange services to residential and small business customers. This would not amount to significant entry in our view.~~

As to the doctrine's fourth prong, we find that the impact from SBC's likely independent entry into Illinois' local exchange market would be significant. We agree with Staff that SBC's own internal business plans should serve as a basis to establish SBC's likely penetration rates in Illinois under either a national, bundled services or a cellular expansion strategy. Following Staff's calculations based on SBC's business documents, we find that SBC's independent entry would likely result in significantly more than a 100 point reduction in the market's HHI. The DOJ Merger Guidelines count such a level of reduction as significant. In fact, the guidelines would find significantly smaller levels of reduction to be significant. We agree and hold that this prong of the doctrine is satisfied. Notably, at the very least, SBC's entry would shake up the market and engender competitive motion which would be a significant impact, especially in light of the fact that the market has seen little competitive movement since deregulatory efforts began.

Under the doctrine's fifth element, we must examine whether a sufficient number of alternative likely entrants exists such that the independent entry of SBC is not required.

~~As mentioned earlier, SBC is not one of only a few potential competitors of Ameritech Illinois. To the contrary, Ameritech Illinois would have at least six major competitors (AT&T, MCIW, Sprint, Bell Atlantic, BellSouth, and US West) after the merger. This number is sufficient and undisputed. (1984 DOJ Merger Guidelines, § 4.133, SBC/Am. Ex. 35.) The argument that certain firms cannot be considered potential entrants because of some current market presence, however small, is not persuasive. The key inquiry is future competitive significance; if AT&T or MCIW have the "potential" to expand their respective market shares in the Illinois local exchange market, then for purposes of this analysis they are both actual competitors and actual potential competitors. *See, e.g.*, *In re Heublein, Inc.*, 96 F.T.C. 385, 590-91 (1980); *In re Champion Spark Plug Co.*, 103 F.T.C. 546, 631 (1984). Indeed, the fact that they already have a toe hold in the market makes them, if anything, even more significant then other potential competitors, that are not currently in the market such as SBC. The presence and visibility of AT&T and MCIW make them the most likely to rapidly capture market share from Ameritech Illinois in the near future.~~

~~Nor can we dismiss AT&T's recent mergers and its stated desire to develop a cable alternative to telephone service. This is evidence of the creative and expansive ways that telecommunications providers are changing the markets. AT&T's cable service, in the next three to five years, could be developed to provide local exchange service on a large scale. We are not persuaded by Staff's attempts to minimize the significance of this venture.~~

Under the doctrine's fifth prong, an insufficient number of alternative likely entrants exists such that the independent entry of SBC is not required. Again, we agree with Staff that in a market with the degree of concentration of the Illinois local exchange market, every possibility of deconcentrating the market must be preserved. Accordingly, without even evaluating the abilities and incentives of other carriers to enter the market, we find that we should preserve SBC as a likely entrant.

Further, we find that with the proposed merger Bell Atlantic is the only carrier that will have the capability to enter the market with any degree of success post merger. The large interexchange carriers, i.e., AI, AT&T, MCI, and Sprint are current competitors and, therefore, should not be considered as actual potential competitors. Further, those carriers have not been able to sufficiently deconcentrate the market despite their efforts to expand their market shares since deregulatory efforts began. In fact, they have been unable to acquire more than minor, niche shares of the market. Their past lack of success eliminates them as carriers upon which we can rely to deconcentrate the market to a sufficient degree. They clearly do not have the capability to do so.

Also, we find that AT&T's recent mergers and stated desire to develop a cable alternative to telephone service is not a reliable basis upon which to find that other carriers' competitive entries are not needed. As Staff explained, AT&T's cable service has not been developed or proven possible on a large scale. AT&T could run into technological problems attempting to develop such cable service. At the least, AT&T will need to complete significant upgrades to its cable network which will delay any offering too many years into the future. Also, we are not in a position to speculate on the type of offering which AT&T will develop. For example, AT&T's offering may be designed to target a small market segment or may be too expensive for most consumers.

Also, U S West and BellSouth will not have the size or scope to be successful competitors in the market post merger. Finally, even though a small number of carriers have entered the market at sellers and there are numerous other certificated local carriers, both facilities and non-facilities based, no evidence exists upon which we can rely to find that they will have any greater success in entering the market than the market's current facilities-based CLEC providers. Further, even though we have certificated many carriers providing switched and resold local services over the past three years, this record indicates that there have been few inroads made to the

Company's monopoly of the local market. That fact indicates that those carriers should not be relied upon to deconcentrate the market. Also, the evidence of record establishes that those carriers have significantly less access to capital and resources than SBC, meaning that those carriers are not comparable entrants to SBC.

Accordingly, the only alternative competitor which is likely to have the ability to compete in the market is a combined Bell Atlantic/GTE post merger. We find that the existence of one alternative entrant clearly insufficient. Rather, we agree with Staff that the market's extremely high level of concentration requires the preservation of all possible market entrants. Accordingly, even if we found that AT&T should be considered a significant alternative entrant, our analysis would not change. As recognized by Staff, the market wherein three competitors control the significant share is classified as a highly concentrated oligopoly, and highly concentrated oligopolies are characterized by the same types of competitive concerns as de facto monopolies.

Based on these facts, we conclude that requiring SBC to enter the market in a manner other than through acquisition of Ameritech is essential to initiate competition within the market. Even though it is unlikely that SBC will be able to single-handedly deconcentrate the market, SBC is likely to obtain a significant share of the market which will work to erode Ameritech Illinois' market share in combination with other entrants; and SBC's entry will engender competition within the market. We hold that it is important to preserve SBC as a significant possibility of eroding Ameritech Illinois' monopoly. Therefore, we hold that a significantly larger number of alternative entrants than exists is needed and that the doctrine's last prong is satisfied.

~~In the final analysis, while SBC could likely enter the local market in the next three to five years, it is improbable that SBC will be able to single-handedly deconcentrate the market or obtain a significant share of the market anymore than other competitors combination with other entrants.~~

It is important to note that the evidence on the issue of whether SBC is an actual potential competitor is such that it allows for more than one reasonable inference. Although we find that the merger meets ~~some~~ all of the elements in the doctrine here discussed, we also find that the imposition of the conditions set forth herein mitigates our concerns. As a result of this finding, we will adopt the proposed "conditions" hereinafter set forth as those conditions we deem necessary to our approval. We will require the Joint Applicants to comply with these measures which are both substantial and meaningful and provide long term assurances. We have the authority to impose these conditions pursuant to our power to review the application for the proposed merger and decide whether the Applicants request should be approved under Section 7-204 of the PUA.

EXCEPTION 2

Staff also takes exception to the issue of savings as set forth below:

SAVINGS

The Commission's analysis and conclusion on the savings issue is set forth beginning at page 85 of the HEPO on re-opening. As discussed at pages 155-159 of Staff's initial brief, pages 108-131 of Staff's reply brief, pages 156-157 of Staff's Brief on Exceptions and pages 58-60 of Staff's Reply Brief on Exceptions filed in the initial phase of this proceeding, Staff respectfully disagrees with the proposed allocation of 50% of net merger savings to ratepayers. Staff proposes that all references to 50% be changed to 100% to be consistent with the savings allocations ordered in the prior merger cases cited in its briefs.

Staff agrees with the HEPO's premise that its interim method be used until the Commission's review of Ameritech Illinois' Alt. Reg. Plan is complete. (HEPO at 87) However, Staff believes that the three year limitation on the flow through of actual savings net of reasonable costs is inappropriate and inconsistent with the earlier conclusion that Staff's interim method be applied until modified by the Commission in its review of AI's Alt. Reg. Plan. Staff also believes that basing the three year limit on "the state of competition in Illinois" is inconsistent with the Commissions conclusion at pages 30-31 of the HEPO that the evidence establishes a significantly concentrated market for local service and that AI is the dominant provider in the market. This issue is discussed further at pages 60-62 of Staff's Reply Brief on Exceptions in the initial phase of this proceeding.

Therefore the HEPO should be modified as follows at pages 85-87:

Commission Analysis and Conclusion

To begin, we agree with the Joint Applicants that the term "savings" in Section 7-204(c)(i) refers to an actual reduction in costs or expenses. Undefined terms in statutes are to be given their "ordinary and popularly understood meaning." Texaco-Cities Pipeline Service Co. v. McGaw, 182 Ill. 2d 262, 270 (1998). The "ordinary and popularly understood meaning" of "savings" is a reduction in costs or expenses. See Funk & Wagnall's New International Dictionary of the English Language: Comprehensive Edition at 1120 (1987) ("save" means "to keep from being spent, expended or lost; avoid the loss or waste of" and "[t]o avoid waste, become economical"); Black's Law Dictionary at 1343 (6th ed. 1990) ("savings" means "economy in outlay; prevention of waste; something laid up or kept from being expended or lost.") Savings does not mean generating more revenue.

Looking to the particulars of Section 7-204(c), the plain language doctrine again leads us to construe "savings" as that term is ordinarily understood, namely, a reduction in costs or expenses. Hence, the urgings of Staff and certain Intervenors that we widen the pool to include "revenue enhancements" are rejected. The mere fact that the parties themselves have consistently drawn a distinction between "expense savings" and "revenue enhancements" reaffirms our belief that "revenue enhancements" is not what the General Assembly intended when speaking of "savings". Courts are not free either to restrict or to enlarge the plain meaning of a unambiguous statute and we also follow this pronouncement. Ehredt v. Forest Hospital Inc. 142 Ill. App. 3d 1009, 492 N.E.2d 532 (1st Dist. 1986).

As for the meaning of "costs", the Commission agrees with Staff that none of the one-time merger costs which relate to the change in ownership of Ameritech, such as banker or brokerage fees, legal fees, or accounting fees, constitute legitimate costs for present purposes. It is only those costs directly associated with AI's provision of service which qualify under Section 7-204(c). Hence, we agree with Staff's position to allow recovery of only those reasonable costs directly associated with the utility's operations.

Given the Commission's strong preference for dealing in matters of certainty, we believe that both the savings and the costs of this transaction as well as their reasonableness, must be determined when actual data, as opposed to estimates, are available. We further note the disparity between the result generated by the Dr. Selwyn and the estimate presented by Mr. Gebhardt, as convincing proof of the need to await actual figures. Moreover, with respect to Dr. Selwyn's savings estimate, we believe that the underlying methodology based largely on the purchase premium paid by SBC for Ameritech is not appropriate for the task. Such an analysis necessarily discounts or excludes the fact that in nearly every transaction of this type there is a multitude of factors and motives underlying both the merger decision and the size of

the premium. Because the cost savings of the merger are calculations, at best, only one of the factors taken into account, they simply cannot be equated with the total premium.

We fully agree with Staff that the Commission needs to make separate rulings on both savings and costs pursuant to Section 7-204(c) requirements. This we intend to do. However, we are not persuaded by Staff's position opposing the netting of savings and costs. To the extent that costs are incurred to produce savings and are shown to be both reasonable and directly related, we agree with the Joint Applicants that netting is appropriate. As a matter of logic, the only savings that can be experienced are net savings. Moreover, our reading of Section 7-204(c) indicates that just such a result is contemplated. We further conclude on the arguments presented, that ~~50%~~ 100% of the net merger savings allocable to AI should be allocated to consumers using Staff's distribution methodology. ~~This strikes a fair balance considering the commitment, performance and benchmark costs which will be incurred post merger.~~

In keeping with our responsibilities under Section 7-204(c) and based on the evidence of record, we direct the Joint Applicants to follow Staff's Interim Method until the appropriate mechanisms are made in the five-year review of the Plan.

To be specific, Ameritech Illinois is required to track its share of all actual merger-related savings and all merger-related costs, as herein defined, separately for the period beginning on the date that the merger is consummated and ending on March 15, 2000. AI shall submit that information as part of its annual Alt. Reg. filing on April 1, 2000. Furthermore, this information will continue to be provided in Ameritech's annual price cap filings until such time as an updated price cap formula has been developed in Docket 98-0252. In the annual price cap filings, AI is required to flow-through merger savings net of reasonable costs in the manner here described until such time as an updated price cap formula has been developed. ~~for a period of three years. A period of three years represents a reasonable time frame given the state of competition in Illinois.~~

It is the ruling of this Commission that the net merger-related savings should be allocated to Ameritech Illinois' customers as follows:

(1) Carriers purchasing AI's UNEs, interconnection, and transport and termination services will benefit from merger-related savings through updated rates resulting from modification of its TELRIC, shared and common costs.

(2) Once the share of the merger-related savings allocable to UNEs, interconnection, transport and termination purchasers have been identified, the remaining balance of savings will be allocated to interexchange, wholesale and retail customers. This will be done by

dividing the remaining merger-related savings between IXCs on the one hand and end users (whether served via retail or wholesale) on the other, based on the relative gross revenues of each of these two groups.

As per Staff's recommendations, which we find to be reasonable, IXCs' share of the merger-related savings should be allocated to those customers through reductions in access charges, including the intrastate PICC. End users' share of the merger-related savings should be allocated as a credit on a per network access line basis to ensure that business customers do not receive a larger portion of the merger-related savings than residential customers.

Consistent with the language set forth above, Staff recommends that Condition 28 and Finding 8 be modified as follows:

CONDITIONS

28) Recordation of All Savings and Costs - The Joint Applicants will be held responsible for recording all savings and all costs relating to the merger in the manner described herein with the ultimate result that ~~50%~~ 100% of the net merger savings be allocated to consumers as previously set forth in this Order. We note that his measure puts the burden on the Joint Applicants to affirmatively evidence compliance in all particulars thus conserving Staff's time and resources.

VII. Findings and Ordering Paragraphs

8) the provisions of Section 7-204(c) are being applied to the reorganization, so that ~~50%~~ 100% of the net merger-related savings as previously defined herein, allocable to Illinois, and to be allocated to the merged company's customers in accordance with the determination set forth in the prefatory portion of this Order;

EXCEPTION 3

Staff also takes exception the following issue addressed in the HEPO:

IV. Additional Commitments by Joint Applicants

The Commissions Analysis and Conclusion at page 126 of the HEPO should be modified to incorporate Staff's recommendation that the costs of special interest funds should not be borne by ratepayers as discussed at page 125 of the HEPO. The following proposed language will clarify this issue:

Commission Analysis and Conclusion

The additional Illinois-specific commitments proposed by Joint Applicants were not necessary as a response to the questions in the June 4, June 15, and July 9 letters. To the extent these commitments exceed those agreed to earlier in this proceeding, then, they are "icing on the cake." We therefore adopt the commitments, which we believe represent a significant benefit to Illinois that would not exist absent the merger, but have no reason to specifically rule on their details, which in any event will need to be worked out over time.

With regard to the CEF and CTF, we agree with Staff that it would be inappropriate and discriminatory for ratepayers to bear the costs of these special interest funds. Therefore, we conclude that no costs associated with these funds shall be netted against merger savings or otherwise recovered from ratepayers. With regard to the CEF, we also conclude that this fund shall not be used as a marketing tool.

Consistent with the language set forth above, Staff recommends that Conditions 8-10 be modified as follows:

Conditions

(8) Consumer Education Fund - SBC/Ameritech will establish, within three months after the Merger Closing Date, a Consumer Education Fund ("CEF") and will make $1 million available to the CEF for disbursement by Ameritech Illinois in each of the three consecutive 12-month periods following the date the CEF is established, for a total of $3 million. All allocated funds remain available to the CEF for the purposes described herein until they are disbursed. Funds shall be allocated to the CEF by Ameritech Illinois, and the use of the funds will be controlled by the CEF Committee. The Committee shall consist of one voting representative each from Ameritech Illinois, Commission Staff, and such other entities as appointed by the Commission and shall make decisions by majority vote. Tie votes, if any, will be decided by the Commission Staff representative. CEF Committee decisions as to how funds should be distributed and expended are subject to Commission review. At its first meeting, the Committee shall establish rules of governance for the operation of the Committee. No funds shall be disbursed until 30 days after the committee files with the Commission a report

of such proposed expenditures. Payments made under this subsection shall not be included in the revenue requirement or cost studies of Ameritech Illinois;

(9) Community Technology Fund - SBC/Ameritech will establish, within three months of the Merger Closing Date, a Community Technology Fund ("CTF") and will make $1 million available to the CTF for disbursement by Ameritech Illinois in each of the three consecutive 12-month periods following the date the CTF is established, for a total of $3 million. All allocated funds remain available to the CTF for the purposes described herein until they are disbursed. Funds shall be allocated to the CTF by Ameritech Illinois, and the use of the funds will be controlled by the CTF Committee. The Committee shall consist of one voting representative each from Ameritech Illinois, Commission Staff, and other entities appointed by the Commission and shall make decisions by majority vote. Tie votes, if any, will be decided by the Commission Staff representative. CTF Committee decisions as to how funds should be distributed and expended are subject to Commission review as described below. At its first meeting, the Committee shall establish rules of governance for the operation of the Committee. Additional volunteer committee members, with full voting rights (except the right to choose additional members), can be selected by unanimous agreement of Ameritech Illinois, Commission Staff and other members. Except for program design and implementation expenses not to exceed $50,000 annually as set forth below, no funds shall be disbursed until 30 days after the committee files with the Commission a report of such proposed expenditures. The CTF shall be dedicated to uses which help assure that rural and low income areas in Illinois have access to advanced telecommunications technology. Such uses may include expenditures for computer equipment and associated software, Ameritech tariffed services, Internet access, technical support, program design and implementation expenses not to exceed $50,000 annually (which amount shall be disbursed to the CTF upon its request, with all expenditures to be reported annually to the Commission), and other associated services and equipment in rural and low income communities. The Commission Staff shall work closely with the CTF committee in implementing this fund and to establish criteria and standards to be used in awarding funds to ensure that it is not administered in a way which has an anti-competitive effect. Payments made under this subsection shall not be included in the revenue requirement or cost studies of Ameritech Illinois;

(10) Community Computer Center - In conjunction with the Community Technology Fund, SBC/Ameritech will also provide funding of $750,000 in the first year following the Merger Closing, and $350,000 per year for two additional years thereafter, to support a Community Computer Center. Payments made under this subsection shall not be included in the revenue requirement or cost studies of Ameritech Illinois;

EXCEPTION 4

ENFORCEMENT: LIQUIDATED DAMAGES PROVISION

In addressing Staff's position regarding questions on enforcement and the liquidated damages provisions, the HEPO, at page 109 reads:

> "With a total cap of $120 million and specific standards and benchmarks to be developed collaboratively or through Commission arbitration, Staff contends that this mechanism provides for a more effective ongoing method of ascertaining parity levels of service to CLECs."

Although it is true that Staff originally was extremely concerned that the Illinois penalty cap be on par with other jurisdictions (ie. Texas at $120 million), Staff found the Joint Applicant's rationale that the Illinois penalty cap amount be based upon an access line comparison between Texas and Illinois to be reasonable. As a result, Staff concluded that the $90 million penalty cap is a fair amount in this instance. The HEPO, therefore, should be modified to read as follows:

> "With a total cap of ~~$120~~ $90 million and specific standards and benchmarks to be developed collaboratively or through Commission arbitration, Staff contends that this mechanism provides for a more effective ongoing method of ascertaining parity levels of service to CLECs."

CONCLUSION

WHEREFORE, for all the reasons set forth herein, Staff recommends that the Hearing Examiners Proposed Order be modified consistent with the recommendations set forth herein.

Respectfully submitted

Illinois Commerce Commission Staff

By: _____
One of its attorneys

Dated: August 17, 1999

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